Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-325

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC. ET AL.
PETITIONERS

V.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL.,
RESPONDENTS

On Writ of Certiorari to
the Supreme Court of Arkansas

BRIEF OF THE TRANSPORTATION CABINET OF THE COMMONWEALTH OF KENTUCKY AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

FREDERIC COWAN,
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

*A. STEPHEN REEDER,
SPECIAL ASSISTANT ATTORNEY GENERAL
PATRICIA K. FOLEY, ATTORNEY
TRANSPORTATION CABINET
COMMONWEALTH OF KENTUCKY
FRANKFORT, KENTUCKY 40622

*Counsel of Record

February 8, 1989
21

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF THE AMICUS CURIAE..... 2

SUMMARY OF THE ARGUMENT..... 5

ARGUMENT..... 7

I. THE THREE-PART TEST OF CHEVRON HAS BEEN MET REQUIRING THAT SCHEINER BE APPLIED PROSPECTIVELY..... 7

A. Scheiner Established a New Principle of Law..... 8

B. To Require Refunds in this Case Will Not Further the Purpose of the Commerce Clause.....12

C. The Equities Favor Prospective Application.....13

II. THE STANDARD OF REVIEW IN CHEVRON CONTINUES TO BE THE MOST FAIR AND EQUITABLE METHOD FOR DETERMINING WHETHER A NEW LAW SHOULD BE APPLIED PROSPECTIVELY.....19

CONCLUSION.....22

TABLE OF AUTHORITIES

Aero-Mayflower Transit Co. v. Georgia Public Service Commission.....10, 11
295 U.S. 285 (1935)

Aero-Mayflower Transit Co. v. Board of Railroad Commissioners.....10, 11
332 U.S. 495 (1947)

American Trucking Association v. Gray..... 3
746 SW2 377 (Ark., 1988),
cert. granted, 109 S.Ct. 389 (1988)

American Trucking Association v. Scheiner. passim
____ U.S. ____, 107 S.Ct. 2827,
97 L.Ed2 226 (1987)

Capitol Greyhound Lines v. Brice... 8, 9, 10, 11
339 U.S. 542 (1950)

Chevron Oil Co. v. Huson..... passim
404 U.S. 97 (1971)

Commonwealth of Kentucky v. American Trucking Association..... 4
746 SW2 65 (Ky 1988)

Complete Auto Transit, Inc. v. Brady..... 17
430 U.S. 274 (1977)

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc..... 9, 11
405 U.S. 707 (1972)

Lemon v. Kurtzman..... 16, 17
411 U.S. 192 (1973)

Massachusetts v. United States..... 8, 11
435 U.S. 444 (1978)

TABLE OF AUTHORITIES --CONT'D

Tyler Pipe Industries v. Department of Revenue.21
_____ U.S. _____, 97 L.Ed2 199 (1987)

Westinghouse Electric Corp. v. Tully..... 12
466 U.S. 388 (1944)

Constitutions
Federal Constitution Art 1 §8 c13..... 12

Kentucky Constitution §36.....15

No. 88-325

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC. ET AL.

-

PETITIONERS

V.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL.,

-

RESPONDENTS

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF OF THE TRANSPORTATION CABINET OF THE COMMONWEALTH OF KENTUCKY AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

Pursuant to Rule 36 of this Court, The Transportation Cabinet of the Commonwealth of Kentucky by its undersigned respectfully submits this Brief as amicus curiae in support of the Respondents.

INTEREST OF THE AMICUS

In 1986 the Kentucky General Assembly finding the fiscal condition of the Commonwealth's dedicated road fund to be in need of additional revenues enacted a new Supplemental Highway Use Tax (SHU Tax). The purpose of this third structure tax was to raise additional road fund revenues in such a way that would fairly allocate the maintenance and construction costs for roads and bridges among the various classes of highway users.[1] Kentucky's SHU Tax replaced a prior weight distance tax which had been in effect since 1982.

The SHU Tax was a third structure tax required to be paid by all vehicles 60,000 pounds or over as an annual fee predicated upon a vehicle's projected mileage operations within the Commonwealth for the period of February 1 to January 31 of each year. The tax provided for five mileage gradations as follows:

less than 10,000 miles	$150
10,000 to 19,999 miles	160
20,000 to 29,999 miles	170
30,000 to 39,000 miles	180
over 40,000 miles	200

The differences between Kentucky's SHU Tax and Pennsylvania's axle tax struck down in American Trucking Association, Inc. v. Scheiner, ____ U.S. ____ ,107 S. Ct. 2827, 97 L.Ed2 226, (1987) and that of the Arkansas HUE tax stuck down in American Trucking Association, Inc. v. Gray, 746 SW2 377 (1988) cert. granted , 109 S.Ct. 389 (1988), have not been significant enough to

---

1 The 1982 Kentucky Weight Distance Tax was anticipated to produce in excess of $32 million for FY 86-87. The statute required that a motor carrier pay 2.85¢ per mile for all miles operated in the Commonwealth. In 1986, Kentucky enacted the SHU Tax which was anticipated to raise $59 Million. When the Kentucky Supreme Court has struck down the SHU Tax, Kentucky has enacted as of April 1, 1988 a 4¢ per mile weight distance tax.

save it from the principles espoused in Scheiner. As a result, on January 21, 1988, the Kentucky Supreme Court, Kentucky's highest state court, struck down Kentucky's SHU Tax having determined it to be a flat tax as defined in Scheiner. (See Commonwealth of Kentucky v. American Trucking Association, Inc., 746 SW2 65 (1988).

As a result of this Court's monumental decision in Scheiner, and the Kentucky Supreme Court in Commonwealth v. ATA, the Transportation Cabinet is now faced with the possibility of having to refund some $59 million dollars in revenue, or 16.2% of its non-restricted dedicated annual road fund budget. One of the central issues in the Kentucky case involves one of the same issues now pending before this court; specifically, whether this court's decision in Scheiner should be applied prospectively if the elements of Chevron Oil Company v. Huson, 404 U.S. 97 (1971), are met.

SUMMARY OF ARGUMENT

When this Court issued its monumental decision in Scheiner in 1987 it expressly remanded back to the states the issue of whether refunds should be given. See Scheiner, 97 L.Ed2 at page 252. Since then, each of the states affected by the Scheiner decision has been analyzing that decision in light of this Court's standard in Chevron to determine whether Scheiner should be applied prospectively.

The only state supreme court to have made such a decision concerning prospective application to date is the Arkansas Supreme Court. Based upon the Arkansas Court's decision that the facts merit prospective application of the Scheiner decision, this Court granted review.

The Commonwealth of Kentucky, like Arkansas, enacted a "flat" tax which was ultimately struck down by the Kentucky Supreme Court based upon this Court's decision in Scheiner. As a result, Kentucky is now faced with the issue of

refunds of $59 million collected before the Kentucky Supreme Court declared Kentucky's statute unconstitutional.

Kentucky is now litigating the issue of refunds. Like the state of Arkansas, Kentucky contends that the three-prong test of Chevron has been met and that Scheiner should be applied prospectively.

However, any decision which this Court issues concerning the standard espoused in Chevron will directly affect the Commonwealth of Kentucky. Therefore, Kentucky urges this court to retain the Chevron standard.

ARGUMENT

I. THE THREE-PART TEST OF CHEVRON HAS BEEN MET REQUIRING THAT SCHEINER BE APPLIED PROSPECTIVELY.

In 1971 the Supreme Court in Chevron Oil Company v. Huson, 404 US 97 (1971), set forth the necessary factors to be considered in deciding whether a decision should be given prospective application. The court stated:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . . or by deciding an issue of first impression whose resolution was not clearly fore-shadowed, ... Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.". . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce

> substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity".
> Chevron, 404 U.S. at 106-07

As the facts set forth herein will indicate the Court's decision in American Trucking Association v.Scheiner, _____ U.S. _____, 107 S. Ct. 2827, 97 L.Ed2 226 (1981), is a case that is clearly subject to prospective application having met the test of Chevron.

A. Scheiner Established a New Principle of Law.

In reliance upon Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950), and its progeny seven states including Pennsylvania, Arkansas and Kentucky enacted some variation of a "flat tax". Capitol Greyhound Lines, 339 U.S. at page 545, specifically held that a "flat" tax was valid unless the amount was shown to be in excess of fair compensation for the privilege of using state roads. The most recent Supreme Court approval of this principle was announced in Massachusetts v.

United States, 435 U.S. 444 (1978), and Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972).

However, in Scheiner, handed down in 1987, this court overruled Capitol Greyhound Lines. The Court stated in the majority opinion in Scheiner :

> "Thus, the precedents upholding flat taxes can no longer support the broad proposition, advanced by appellees, that every flat tax for the privilege of using a State's highways must be upheld even if it has a clearly discriminatory effect on commerce by reason of that commerce's interstate character."
> Scheiner , 97 L.Ed2 at page 251

Thus, the Supreme Court precedent upon which Arkansas and Kentucky relied when enacting their tax schemes was valid prior to the issuance of Scheiner but not after its holding was issued. Such a holding makes it clear that Scheiner overruled Capitol Greyhound Lines.

Justice O'Connor was even more explicit in her dissent to Scheiner in stating

that Scheiner was in fact a new law which expressly overruled Capitol Greyhound Lines, when she stated:

> "In finding Pennsylvania's "flat" highway use taxes unconstitutional under the Commerce Clause, the Court today directly overrules the holdings of at least three cases; Capitol Greyhound Lines v. Brice, 339 US 542, 94 L Ed 1053, 70 S Ct. 806, 17 ALR2d 407 (1950); Aero Mayflower Transit Co. v. Board of Railroad Comm'rs, 332 U.S. 495, 92 L Ed 99, 68 S. Ct 167 (1947); and Aero Mayflower Transit Co. v. Georgia Public Service Comm'n, 295 U.S. 285, 79 L Ed 1439, 55 S. Ct 709 (1935)." Scheiner97 L.Ed2 at page 252.

There can be little or no question that Scheiner set forth a new standard regarding what constitutes a legal tax, one which requires states to implement taxes in directions other than those upheld in Capitol Greyhound Lines.

However, even if this Court were not to view Scheiner as overruling past precedent on which Arkansas and Kentucky relied, it is clear that it raised an issue of first impression whose resolution was not clearly foreshadowed by prior court precedent. The Commonwealth of Kentucky had

in place since 1982 a weight distance tax, of the type endorsed by Scheiner, 97 L.Ed2 at page 251. However, in reviewing this Court's prior decisions in Capitol Greyhound, Aero Mayflower, Evansville and Massachusetts Kentucky substituted a "flat tax" in place of the weight distance tax. If the Kentucky General Assembly had any suspicion whatsoever that this court would strike down an entire line of case precedent, Kentucky would never have changed its tax structure but would have simply raised the cost per mile on its weight distance which the Kentucky General Assembly did in 1988 when it re-enacted its weight distance tax. The Scheiner decision itself was issued on a 5-4 vote of the Supreme Court. As such it appears that the Court itself was closely divided in its analysis of a flat tax and whether or not all flat taxes are violative of the Commerce Clause.

Given these facts, it appears that the first of the three part test under Chevron has been met.

B. To Require Refunds in This Case Will Not Further the Purpose of The Commerce Clause .

The second test imposed by Chevron requires that the Courts consider the prior history of the rule in question (in this case the Commerce Clause), its purpose and effect, and then determine whether retrospective application will advance or hinder that operation.

This Court stated in Scheiner, 97 L.Ed2 at page 241, that the purpose of the Commerce Clause of the Federal Constitution (Art 1 §8 cl 3) is to promote freedom of trade in and among the states. See also Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1944).

The Petitioners have suggested that to require those states which relied upon clear prior case precedent to disgorge the "unconstitutional" tax would remedy any injury they may have suffered, and would deter any further violations. However, the Petitioners have not alleged nor even suggested that the flat taxes caused any carrier to cease operation or endure great financial

hardship. Further, such an argument totally ignores that the Petitioners as well as the traveling public have obtained the benefits of the tax collected by use of the highways. In fact, by virtue of their excess weight, the Petitioners have received an even greater benefit since they cause more damage to the highways than a single automobile.

While this Court has determined that flat taxes of the Scheiner variety did not fairly allocate the tax burden between intra and inter-state carriers, it is difficult to see how a windfall tax refund to carriers who have operated in and through Arkansas and Kentucky will advance the goal of the Commerce Clause to establish an area of trade free from state interference. Whatever disadvantage may have been suffered is a thing of the past and refunds cannot redress that problem.

C. The Equities Favor Prospective Application

The third factor to be considered in applying Chevron, requires the balancing of equities. Courts must balance the possibility that a retroactive application of the new law will produce substantial inequitable results against the need to right a wrong which has been done. The consideration for a retroactive application of Scheiner requires the balancing of a requirement that each of the states which enacted a "flat" tax disgorge the proceeds resulting in disrupted budgets, voided contracts for road and bridge maintenance and construction, as well as the need to recover money already spent on the highway system for the benefit of the traveling public at large against the remote possibility that refunds will provide a remedy for an injury.

The individual states bear the responsibility through their elected officials to enact and collect taxes for the benefit of the public, all the public, not just motor carriers. The responsibility for enacting laws for the

purpose of taxation while never a popular one, must be dealt with by each state legislature.

The state legislatures have justifiably relied upon past Supreme Court precedent in order to develop a tax structure which included a "flat" tax. Each state felt comfortable that its statute would pass the test of judicial scrutiny. Based upon that good faith reliance Arkansas collected in excess of $130 million, Pennsylvania collected in excess of $300 million, while Kentucky for the single year of its SHU Tax collected $59 million.

When this Court handed down Scheiner, the issue of refunds and current existing state budgets predicated upon already collected, expended, or anticipated revenues became a critical problem to each of those states where a flat tax had been enacted.

Kentucky's legislature meets on the biennium which means that Kentucky road funds are allocated in a two year budget. (See Kentucky Constitution §36.) In the Commonwealth of Kentucky alone, the refund of some $59 million or more than

16% of the annual non-restricted dedicated road funds will result in a disrupted budget for years to come. The simple facts will reveal that Kentucky has issued contracts, begun construction, initiated repairs, and encumbered by appropriation all of the $59 million it collected. These funds were not merely spent for the benefit of motor carriers but were expended for the benefit of all the traveling public, not just Kentucky residents.

A review of the facts in this case demonstrates that members of the private sector as well as the public at large have relied upon the appropriated budgets of each state. The Petitioners have suggested that paying back the tax would set right any competitive edge which Arkansas carriers may have enjoyed. However, as was pointed out, whatever harm may have been done to the Petitioner has already occurred, and a refund is not a remedy. The remedy was in removing the tax itself. As this court noted in Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II)

reliance on state budgets weighs heavily in shaping an equitable remedy.

> "Offsetting the remote possibility of constitutional harm from allowing the State to keep its bargain are the expenses incurred by the schools in reliance on the state statute inviting the contracts made and authorizing reimbursement for past services performed by the schools. It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." Lemon II, 411 U.S. at page 203

It is clear that there was never an intent on the part of the states that the Petitioner should be given a tax free year. It is well settled law that interstate commerce can be made to pay its way. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

Particularly in the case of Kentucky if the Kentucky General Assembly had suspected that the SHU Tax would be declared unconstitutional, Kentucky would just as easily have increased its current weight distance tax to raise the additional

revenues needed. In fact, since the removal of flat taxes nearly all the states have embarked upon different well accepted methods of taxation.[2]

The balancing of the equities clearly falls heavily upon the side of the public who benefited from the use of the tax proceeds. A refund can only injure innocent parties who have executed contracts with the various states and have already begun performance, as well as the public who will suffer when the public highways cannot be repaired.

---

[2] Of those states affected Kentucky reenacted its weight distance and raised it to 4¢/mile, increased registration fees and raised its fuel taxes. Arkansas enacted a weight distance tax, Pennsylvania raised registration fees and fuel taxes, Vermont raised its fuel taxes, Maryland raised its registration fees and its fuel tax, and Indiana raised its registration fees and its fuel taxes.

II. THE STANDARD OF REVIEW IN CHEVRON CONTINUES TO BE THE MOST FAIR AND EQUITABLE METHOD FOR DETERMINING WHETHER A NEW LAW SHOULD BE APPLIED PROSPECTIVELY

When this Court announced the standard of review in Chevron in 1971 it established clear guidelines for dealing with the prospective application question. Chevron has withstood the test of time, but more importantly it has allowed for a fair and equitable application of new law. The purpose and intent behind the prospective application rule of Chevron is to provide for the least amount of damage to all parties when applying new case law.

If the requirements of Chevron are to be altered or changed, Kentucky is urging this court to consider the people who will be affected. It is all too easy at times to view a state in much the same category as one views a corporation. If a corporation is required to return money improperly collected it is anticipated

that such payments will be paid from corporate profits. However, when applying such principles to states the issues are somewhat different. When a state is required to refund monies collected there are no "profits" from which to extract such payments. Such refunds come from monies already allocated or as in this case already budgeted and expended. The Commonwealth of Kentucky as any other state holds in trust public funds, and as the trustee of such funds rightfully owes a duty to the public to account for their expenditure. The balancing of all the factors espoused in Chevron, reliance on past precedent, whether refunds can remedy a past wrong, and the balancing of equities--all weigh in favor of prospective application of Scheiner. Because of the enormous impact that a retrospective application of Scheiner will have upon the public, any consideration given by this court to change the standard of Chevron should be weighted in favor of the public who is entitled to the proper use of those funds.

As this Court correctly recognized in Scheiner the specific application of the Chevron standard is one which is best left to the individual states:

> "Appellees request that in the event of an adverse decision, the Court remand the case to the Pennsylvania Supreme Court to consider whether our ruling should be applied retroactively and to decide other remedial issues. We agree that having decided the constitutional issue presented to us, we should remand for further proceedings in the marker fee, axle tax, and marker fee refund suits. Scheiner 97 L.Ed2 at page 252, See also Tyler Pipe Industries v. Department of Revenue, _____ U.S. _____ , 97 L Ed2 199 (1987) at p. 217.

If the state courts are inconsistently or improperly applying the Chevron standard, such matters can be readily addressed by this Court. However, the guidelines of this Court are fair and equitable and set forth a standard which recognizes and balances the needs of all parties concerned.

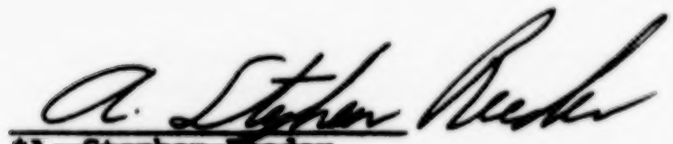
CONCLUSION

Given the foregoing law, Chevron continues to be a fair and equitable standard in deciding prospective application of new laws. There is no reason to disturb that ruling. The facts surrounding Scheiner clearly demonstrate that is is appropriate for the state courts to prospectively apply it.

Respectively submitted,

Frederic Cowan, Attorney General
Commonwealth of Kentucky

*Counsel of Record



*A. Stephen Reeder
Special Assistant Attorney General
Patricia K. Foley
Attorney
Transportation Cabinet
Commonwealth of Kentucky
Frankfort, Kentucky